APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,331

UNITED STATES OF AMERICA, *Appellee,*
versus
NATHAN WECHSLER, *Appellant.*

No. 11,352

UNITED STATES OF AMERICA, *Appellee,*
versus
ROBERT C. COTTEN, JR., *Appellant.*

No. 11,355

UNITED STATES OF AMERICA, *Appellee,*
versus
SIGMUND GOLDBLATT, *Appellant.*

No. 11,356

UNITED STATES OF AMERICA, *Appellee,*
versus
A. CLAIBORNE LEIGH, *Appellant.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Decided April 8, 1969).

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

Order

PER CURIAM:

A divided panel of this court affirmed the convictions of these defendants under 18 U.S.C. § 371, 1952, on February 5, 1968. On March 7, 1968, the court denied a petition for

rehearing en banc by a vote of five to one, with one judge abstaining. Subsequently, the original panel unanimously affirmed denial of a motion for a new trial lodged in the district court. Recently the same panel authorized the filing of a second petition for rehearing based upon the decision of the United States Supreme Court in *United States* v. *Nardello*, — U.S. —, 37 L.W. 4073 (Jan. 13, 1969). In response to our invitation, the appellants and the United States have submitted briefs and we have carefully considered them. After consultation with non-panel members of the court, we now reject the second petition for rehearing.

We do not read *Nardello* as undercutting our prior decision. The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought that it did despite language in the Virginia cases that the crime of bribery is complete when the bribe is paid.[1] Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo*, but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond the jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute.

Nardello,[2] *supra*, displays, we think, some degree of impatience with fine lines, careful distinctions and labels. It

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[1] We noted that Cotten's bribe was deposited in his account two days after enactment of the Travel Act. 392 F.2d 344, 347.

[2] The Supreme Court noted probable jurisdiction in *Nardello* on June 17, 1968, the same date on which it denied certiorari in this case.

rejects the contention that "peculiar versions of state terminology are controlling," and looks at the elements of state crime generically. The question is said to be "whether the particular state involved prohibits the extortionate activity charged." We do not doubt that Virginia does. It is made plain that the term "extortion" as used in the Travel Act was not intended to track closely the legal understanding under state law. It is enough that the corrupt activity of the appellants in procuring rezoning was illegal under Virginia law.

The petition for rehearing is

DENIED.

WINTER, *Circuit Judge*, dissenting:

In dissenting from the affirmance of the judgments of conviction, I was of the view that 18 U.S.C.A. § 1952 was inapplicable because the state crime of bribery had been completed before the use of facilities in interstate commerce to accomplish an unlawful state purpose was made illegal. It followed, so I thought, that the majority's view gave unconstitutional retrospective effect to the federal statute and tortured the meaning of the federal statute by holding illegal the use of facilities in interstate commerce unaccompanied by any intent to violate state law. *United States* v. *Wechsler*, 392 F. 2d 344, 349-354 (4 Cir. 1968).

United States v. *Nardello*, — U. S. —, 21 L.Ed. 2d 487 (1969), only confirms my view. It is replete with references to the concept that the federal act was intended to aid state law enforcement authorities *in the enforcement of state law*. In performing this supplementary purpose, the federal act cannot apply where state law is inapplicable. Where the state crime is complete, subsequent use of interstate facilities is not made illegal under federal law.

To avoid the plain thrust of *Nardello,* the majority significantly shifts the basis of its prior decision. In speaking originally, the majority said:

> "We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete.* But their crime was not yet completed. * * * The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the re-zoning was accomplished and the accomplishment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the re-zoning was accomplished on July 25, 1962." 392 F. 2d 346-347 (emphasis in original).

Now the majority seeks to explain its prior holding by the statement:

> "The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought it did despite the language in the Virginia cases that the crime of bribery is complete when the bribe is paid. Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo,* but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond that jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia

to procure rezoning would be beyond the reach of Virginia's bribery statute." (footnote eliminated.)

That initially the majority purported to rely on federal law even though it now claims that it relied on state law, and that its opinions are thus mutually contradictory are manifest.

Two other comments are in order. First, for its initial statement the majority relied heavily on an authority which no longer exists. See, present opinion in *United States* v. *Wingo,* 394 F. 2d 484 (6 Cir. 1968). Second, in its latest expression, the majority need not speculate what the Supreme Court of Appeals of Virginia may hold with regard to corrupt public officials who receive bribes outside of the state of Virginia and then return. In such instances, the Virginia statutes make the promise, offer or gift of a bribe, as well as acceptance of the bribe, a criminal act, without more. 4 *Code of Virginia* (1960 Repl. Vol.) §§ 18.1-278; 18.1-279. The holding should be clear. This is no indication, however, that Virginia would treat as proscribed conduct acts occurring after payment of the bribe. To the contrary, *Ford* v. *Commonwealth,* 15 S.E. 2d 50, 52 (Va. 1941), tells us "[i]t [the statute] prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, any one of which is a complete crime in itself." Certainly, there is no warrant for concluding that the Virginia law extended to the rezoning, so as to carry with it the federal law, as to these defendants.

For the reasons I originally stated and on the authority of *Nardello,* I dissent from the denial of the petition for rehearing.

APPENDIX B

Article I, § 9, cl. 3 of the Constitution of the United States provides:

> No bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371 provides, in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1952 provides, in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

* * *

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * *

Virginia Code § 18.1-278 provides:

Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his

official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

Virginia Code § 18.1-279 provides:

Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office.